

January 12, 2004  
DECISION AND ORDER  
OF THE DEPARTMENT OF ENERGY

*Appeal*

Name of Petitioner:           Citadel Energy Products, LCC

Date of Filing:               November 26, 2003

Case Number:                TFA-0048

On November 26, 2003, Citadel Energy Products, LCC (CEP), filed an Appeal from a final determination that the Energy Information Administration (EIA) of the Department of Energy (DOE) issued on October 24, 2003. In its determination, EIA denied CEP's request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require EIA to release the information it withheld.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that is required to be withheld or may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

*I. BACKGROUND*

In a letter dated August 27, 2003, CEP submitted a FOIA request to EIA for "(i) the actual sum total of working gas in each geographical region reported in Form 912s on a weekly basis and (ii) the actual sum total of working gas in each region reported in Form 191s on a monthly basis by those parties required by the EIA to submit Form 912s." Request Letter dated August 27, 2003, from Jeffrey W. Mayes, Attorney for CEP, to Abel Lopez, Director, FOIA/Privacy Act Office, DOE. No individual firm's data was sought. CEP sought aggregated data by regions, for the period from the time EIA began gathering the data until the present. If the information CEP requested was not available on any existing document, alternatively, CEP requested redacted copies of the Forms 191 and 912.

On October 24, 2003, EIA denied the request. EIA withheld the information, both aggregate data and individual form data, claiming it was exempt from disclosure under Exemption 4. EIA claimed that the information CEP was seeking is protected because it was "commercial

or financial information obtained from a person [which is] privileged or confidential.” In its Appeal, CEP disputes the withholding of information under Exemption 4. First, CEP asserts that EIA did not explain its withholding of the aggregated data. Appeal dated November 26, 2003, from Jeffrey W. Mayes, Attorney for CEP, to George B. Breznay, Director, OHA, at 8 (Appeal). Secondly, CEP argues that EIA failed to show that its ability to obtain the information in the future would be impaired. *Id.* at 6.

## II. ANALYSIS

Exemption 4 exempts from mandatory public disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to qualify under Exemption 4, a document must contain either (a) trade secrets or (b) information that is (1) “commercial” or “financial,” (2) “obtained from a person,” and (3) “privileged or confidential.” *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). In *National Parks*, the United States Court of Appeals for the District of Columbia Circuit found that commercial or financial information submitted to the federal government under non-voluntary conditions is “confidential” for purposes of Exemption 4 if disclosure of the information is likely either (i) to impair the government’s ability to obtain necessary information in the future or (ii) to cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770; *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993) (*Critical Mass*). By contrast, information that is provided to an agency *voluntarily* is considered “confidential” if “it is of a kind that the provider would not customarily make available to the public.” *Critical Mass*, 975 F.2d at 879. Because the two forms involved here are mandatory filings under the Federal Energy Administration Act of 1974 (P.L. 93-275), we find that the withheld information was involuntarily submitted to EIA. *BP Exploration, Inc.*, 27 DOE ¶ 80,216 at 80,796 (1999); *see William E. Logan, Jr.*, 27 DOE ¶ 80,198 (1999). Thus, as we have held previously, for this information to be properly withheld under Exemption 4, the *National Parks* test must be met.

Under *National Parks*, the first requirement for Exemption 4 protection is that the withheld information must be “commercial or financial.” Courts have held that these terms should be given their ordinary meanings and that records are commercial so long as the submitter has a “commercial interest” in them. *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (citing *Washington Post Co. v. HHS*, 690 F.2d 252, 266 (D.C. Cir. 1982)). Second, the information must be “obtained from a person.” “Person” refers to a wide range of entities, including corporate entities. *Comstock Int’l, Inc. v. Export-Import Bank*, 464 F. Supp. 804, 806 (D.D.C. 1979).

Finally, to qualify for Exemption 4 protection under *National Parks*, information must also be “confidential.” Withheld information is “confidential” if it meets the test set out in *National Parks*. In this case, the withheld information would be considered “confidential” if release would either (a) cause substantial harm to the competitive position of submitters or (b)

impair EIA's ability to obtain the necessary information in the future. Analyzing whether release would cause substantial competitive harm involves two elements: 1) whether the submitters face actual competition and 2) whether disclosure would likely cause substantial competitive injury. *National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673, 679 (1976) (*National Parks II*). Pertinent to this case, the determination to withhold information under Exemption 4 must adequately justify the withholding by explaining briefly how the claimed exemption applies to the document. *R.E.V. Eng Services*, Case No. VFA-0626, 28 DOE ¶ 80,131 (2000); *Paul W. Fox*, 25 DOE ¶ 80,150 at 80,622 (1995); *Arnold & Porter*, 12 DOE ¶ 80,108 at 80,527 (1984).

In the present case, the Determination Letter provides only one statement implying that the aggregate data CEP requested are exempt from disclosure under Exemption 4, because their release would negatively impact the quality of the data contained in EIA's Weekly Natural Gas Storage Report. We have previously found this type of conclusory explanation insufficient. *Id.* at 80,528. *Arnold & Porter* requires that an explanation be set forth showing how the exemption applied to the specific document. That explanation must show that serious thought was given to the reasons justifying the withholding of each document. *Id.* at 80,529. In addition, EIA neither affirmed or denied that a document existed containing the aggregate information CEP seeks. Further, it failed to specifically provide any explanation of how Exemption 4 applied to the aggregate information, if it exists. We will remand the matter to EIA for a description of the relevant document or documents and an explanation of how the exemption applies.

### III. CONCLUSION

We are remanding the matter to EIA for identification of any document that contains the requested aggregate data, and for an adequate justification stating how Exemption 4 applies to any such documents. We have not made a determination on whether copies of the Forms 191 and 912 filed with EIA since it began gathering such forms can be withheld under Exemption 4. If a document containing the aggregate information exists, EIA should issue a new determination releasing the document or properly justifying withholding the requested information. If no such document exists, EIA should issue a determination stating that no document exists. CEP shall have 30 days from that date to appeal EIA's October 24, 2003 determination withholding the forms based on Exemption 4.

It Is Therefore Ordered That:

- (1) The Appeal filed by Citadel Energy Products, LCC, on November 26, 2003, Case No. TFA-0048, is hereby granted as set forth in Paragraph (2) below.
- (2) This matter is hereby remanded to the Energy Information Administration of the Department of Energy, which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: January 12, 2004